313 U.S. 581 (4)

Office - Supreme Court, U.
FILED
APR 16 1941
CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 957

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PAUL M. NIEBELL,
W. W. SPALDING,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	2
Questions presented	4
Statement	5
Specification of errors to be urged	8
Reasons for granting the writ	9
The Creek River Bed Lands had a value at the time of allotment	16

Citations.

Cases:

Appleby v. *City of Buffalo*, 221 U. S. 524	18
Brewer Oil Co. v. *United States*, 260 U. S. 77	7
Chicago, M. & St. P. Ry. Co. v. *Mason*, 122 N. W. 601	18
Jones v. *Meehan*, 175 U. S. 1, 11	10
United States v. *Hayes*, 20 F. (2d) 873, 890	7
United States v. *Klamath & Moadoc Tribes*, 304 U. S. 119	18
United States v. *Shoshone Indians*, 299 U. S. 476	18
United States v. *The Creek Nation*, 295 U. S. 103	18

Statutes and Treaties:

Act of March 1, 1901, c. 676, 31 Stat. 861, 862, 864 (ratifying Original Creek Agreement)	3, 4, 6
Act of May 27, 1902, c. 888, 32 Stat. 245, 259-260	3, 6
Act of June 20, 1902, c. 1323, 32 Stat. 245, 259-260 (ratifying Supplemental Creek Agreement)	4
Act of April 26, 1906, c. 1876, 34 Stat. 137, 148	15
Act of May 24, 1924, c. 181, 43 Stat. 139	2

Page

Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 Jud. Code, 28 U. S. C. A. 129) 2
Act of May 22, 1939, c. 140, 53 Stat. 752 2
Treaty of February 14, 1833, 7 Stat. 417, 419 5
Treaty of June 14, 1866, 14 Stat. 785, 786 5

Miscellaneous:

"And Still the Waters Run", by Angie Debo, Princeton University Press, 1940, pp. 146-147 14
Rept. Dawes Commission, dated November 20, 1894, pp. 65-66 17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 957

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Creek Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on November 12, 1940.

Opinion Below.

The opinion of the Court of Claims is not as yet reported (R. 13).

Jurisdiction.

The judgment of the Court of Claims was entered on November 12, 1940 (R. 19). Motion for a new trial filed in the proceedings was overruled on February 3, 1941 (R. 19). The jurisdiction of this Court is invoked under Sec-

tion 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional Act approved May 24, 1924, c. 181, 43 Stat. 139, reads in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States: *Provided, however,* that the provisions of this act shall not be construed to confer jurisdiction upon the court to hear, examine, consider, and adjudicate any balance claimed to be due on the so-called Loyal Creek claim, or any amount claimed to be due to equalize allotments among members of the Creek Tribe."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

> "In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such

event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

The original Creek agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, 862, 864, provides in part as follows:

"3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. * * *

* * * * * * *

"9. When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, * * *."

The Act of May 27, 1902, c. 888, 32 Stat. 245, 259-260, reads in part as follows:

"* * * That the just and reasonable share of each member of the * * * Creek, * * * Na-

> tion * * * of Indians, in the lands belonging to the said tribe * * *, which each member is entitled to hold in his possession until allotments are made, as provided in the act entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes', approved June twenty-eight, eighteen hundred and ninety-eight, be, and the same is hereby, declared to be * * * one hundred and sixty acres for each member of the Creek Nation, * * *."

Questions Presented.

The questions presented are as follows:

1. Whether the parties to the Original Creek Agreement, approved by Act of March 1, 1901, c. 676, 31 Stat. 861, and the Supplemental Creek Agreement, approved by Act of June 30, 1902, c. 1323, 32 Stat. 500, understood and intended that the patents issued thereunder to riparian allottees, and describing the meander lines as the boundaries, would convey by implication title to lands beyond said described boundaries to the thread of the stream.

2. Whether or not the owner of a river bed is the owner of a valuable property right.

The petitioner contends that the Creek Indians understood that the title to the river beds was to remain in the tribe for the use and benefit of all members of the tribe, as unallotted lands of the Creek Nation; and that it was not intended that the patents to riparian allottees should convey by implication title to lands in the beds of said streams. This also was the intention and understanding of the United States, the other party to said Creek Agreements.

The petitioner further contends that the United States, as guardian of said Creek Nation, had full administrative control over the affairs of petitioner, and that because of the failure of respondent so to draft the patents to con-

form to the intention of the parties, said respondent has become liable to petitioner as for a taking of said property under the power of eminent domain.

Statement.

The material facts are set forth in the findings of the court below and in extracts of the evidence below which have been incorporated into the record, and are summarized as follows:

The Treaty of February 14, 1833, 7 Stat. 417, between the Creek Nation and the United States guaranteed to the Creek Nation the country assigned to it west of the Mississippi River, and provided further that (*supra*, p. 419):

> "The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

To carry out this treaty provision, on August 11, 1852, the United States conveyed to petitioner a certain tract of land in what is now the State of Oklahoma, within the boundaries of which were portions of the Arkansas, Canadian, and Cimarron Rivers (R. 14). The *habendum* clause of the patent reads as follows (R. 14):

> "To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby conveyed to them."

By Treaty of June 14, 1866 (Art. 3, 14 Stat. 785, 786), the Creek Nation ceded to the United States the westerly half

of that tract, but expressly retained the easterly half as its permanent national domain, which it was occupying in communal ownership at the time of the execution of the Agreements of March 1, 1901, c. 676, 31 Stat. 861, and of June 30, 1902, c. 1323, 32 Stat. 500, providing for the division of the tribal estate and for the allotment of tribal lands equally among the members of said tribe.

The Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, provided in part that:

> "3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. * * *
>
> * * * * * * *
>
> "9. When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, * * *."

The Creek Indians understood the terms of the Creek Agreement to mean that each member of the Creek Tribe was to receive 160 acres of Creek National Domain, and that the river beds were to be reserved to the tribe as unallotted lands, for the use and benefit of all members of the tribe (R. 20-49).

The Act of May 27, 1902, c. 888, 32 Stat. 245, 259-260, provided in part:

> "* * * That the just and reasonable share of each member of the * * * Creek * * * nation * * * of Indians, in the lands belonging to the said tribe * * *, which each member is entitled to hold in his possession

> until allotments are made, as provided in the act entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes' approved June twenty-eight, eighteen hundred and ninety-eight, be, and the same is hereby, declared to be * * * one hundred and sixty acres for each member of the Creek Nation, * * *."

The lands within said river beds were not included in the allotments, and the patents to riparian allottees along said rivers clearly described by metes and bounds the meander lines thereof as the boundaries of the lands conveyed.

During the process of allotment, in 1902, oil was discovered in the Arkansas River basin within the Creek Nation, at Red Fork (near Tulsa), making these river bed lands a potential oil field, of considerable value.

The title of the Creek Nation to said river beds was not questioned until some years thereafter, when the State of Oklahoma claimed title to the river beds as navigable streams, and executed leases to various parties for the drilling of oil therein. Subsequently, on December 27, 1913, the United States filed a bill against said lessees, claiming title for the Creek Nation. In view of the holding of this Court in *Brewer Oil Company* v. *United States,* 260 U. S. 77, that the Arkansas River within the Creek country was not navigable, the State of Oklahoma permitted a decree to be taken against her. The suit then proceeded between the United States on behalf of the Creek Nation and the holders of leases from adjoining landowners.

In *United States* v. *Hayes,* 20 F. (2d) 873, the Court decided that the title to the river beds was in the adjoining landowners, the United States failing to present therein evidence of the intention of parties to the Creek Agreements as to the title of said river beds. In this case the Court said (*supra,* p. 890):

> "(11) As to the second ground, to-wit, the rule of construction in favor of the Indian:—No reason or facts

are presented to show that these Indians, individually or as a tribe, understood or intended that these river bed lands should remain the property of the tribe."

Because of the failure of respondent to present this necessary evidence, the Court was forced to apply the white man's rule of riparian ownership, without considering the understanding and intent of the Indians concerning the title of these river beds. Thus the Creek Nation lost said river bed property.

Specification of Errors to be Urged.

The court below erred:

1. In holding that the failure of the United States, the trustee of petitioner, to draft the patents to riparian allottees so as to reserve expressly to the Creek Nation the lands comprising the river beds, as was the intention of the parties to the Creek Agreements of 1901 and 1902, thus permitting a construction that said patents conveyed title to said riparian allottees to the thread of said streams, was not a taking of these lands by the United States.

2. In failing to find and hold that it was the purpose and intention of the parties to said Creek Agreements to reserve to the Creek Nation the river beds as unallotted lands of said nation, and that it was not intended that the patents to riparian allottees should convey lands to the thread of the streams.

3. In failing to find and hold that said river beds had a known value at the time of allotment, in that oil was discovered in 1902 within the limits of the Creek Nation at Red Fork, in the Arkansas River bottom, and that at the time of allotment said river bed lands were valuable not only for oil and gas purposes, but also for water supply, sewage, sand and gravel, etc.

4. In failing to find and hold that said Indians understood that the standard allotment was 160 acres of Creek National Domain, the appraised value of which was to be the basis for equalizing allotments under the terms of the Creek Agreements.

5. In finding that: "It was, however, the purpose of all the parties that all of the lands of the Creek Nation except those expressly reserved for certain named purposes should be either allotted or sold, and that the Creek Nation should go out of existence, and the citizens thereof should become citizens of the United States."

Such finding is not supported by any evidence, but, rather, is contrary to all the evidence adduced on the point.

6. In finding that: "In making the allotments and selling the land adjoining these rivers", meaning the Canadian, Arkansas, and Cimarron Rivers, "it was not the intention of the Creek Nation to reserve for itself the river beds of those streams."

This finding of fact is not supported by any evidence but, rather, is contrary to all the evidence adduced on the point.

Reasons for Granting the Writ.

The main issue in this case is the intention of the parties to the Creek Agreements. We believe that the lower Court erred in failing to give effect to the understanding of the Indians as to the terms of the Creek Agreements with respect to the Creek river bed lands. This understanding was *not* before the Court in the *Hayes* case, *supra*, and said evidence is presented to the court in this proceeding for the first time. The lower court has failed to give effect to this understanding as set forth in the evidence presented, and in failing to do so has run afoul of the well settled principle

laid down by this Court in *Jones* v. *Meehan* (175 U. S. 1, 11) that an Indian treaty or agreement—

> "* * * must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. * * *"

In the respects referred to in the foregoing assignment of errors, the findings of fact of the court below were not only not supported by any substantial evidence but were contrary to all the evidence adduced on these points.

The evidence of the understanding of the Indians to the Creek Agreement is clear as to three related matters:

1. That the Indians understood that each member was to be allotted 160 acres of the Creek National Domain;

2. That title to the river beds were intended to be retained in the tribe for the use and benefit of all of the members of the tribe, as unallotted lands of the Creek Nation; and

3. That at the time of the execution of the Creek Agreements, the Indians did not discuss the common law doctrine of the riparian ownership of lands, that they knew nothing of such a doctrine, and that they did not intend it to apply to these river bed lands.

As to point 1, Mr. Joseph Bruner testified (R. 20, 21, 24):

> "Q. You were, then, a member of the House of Kings and a member of the Creek Council when the Original Creek Agreement with the United States was considered in 1901 and when the Supplemental Creek Agreement was considered in 1902, were you not, Mr. Bruner?
>
> "A. Yes, sir, I was.
>
> "Q. What was the understanding as to the share in land on the part of the Indians under the two agree-

ments, as to the share in acres each citizen of the Tribe would receive?

* * * * * * *

"A. We were to receive 160 acres in each individual allotment.

"Q. Was the matter discussed by the House of Kings and the House of Warriors?

"A. Yes, we had quite a discussion in the House of Kings, I remember.

"Q. And you state that the understanding of the House of Kings was that each Indian received a share of 160 acres?

"A. Yes, we had quite a discussion in the House of Kings, I remember.

"Q. And you state that the understanding of the House of Kings was that each Indian received a share of 160 acres?

"A. Yes, sir, and it was so adopted by the House of Kings.

* * * * * * *

"A. It was intended to give each Indian as near as possible 160 acres of land as their proportionate share of the Creek tribal lands."

As to point 2, Mr. Bruner testified (R. 22, 26):

"Q. What was the understanding of the Indians as to ownership of these riverbeds?

"A. Never was intended to take any allotment in the riverbeds when we accepted the treaty, and was no understanding that we took any part of the riverbeds.

"Q. What was your understanding as to what the situation was as to the riverbeds—who owned them?

"A. Creek people, as public domain belonging to Creek Nation.

* * * * * * *

"Q. Do you know whether or not the Creek Nation considered these riverbeds as unallotted tribal lands and public domain?

"A. Yes, sir.

"Q. What did they consider about it?

"A. Considered it public domain. We had fishing rights,—all the Indians had the right to participate for that."

As to point 3, Mr. Bruner testified (R. 21, 24-25):

"Q. Mr. Bruner, at that time, did you ever—had you ever heard of the doctrine of riparian ownership?

"A. No, sir.

"Q. Had you ever heard of the doctrine of the common law of England, or of any rule of the United States Survey by which a patent describing land bounded by the meander line of a stream would convey not only the acreage actually described, but also half of the riverbed?

"A. No, sir, at the time of the ratification of that treaty no explanation was made to us.

* * * * * * *

"Q. Did the Council have any skilled lawyers in its body who understood the doctrine of riparian rights?

"A. No, sir, not to my knowledge. I wasn't, and I think the rest of the boys were about the same.

"Q. And when the United States said '160 acres according to the United States Survey', what did the Indians think that meant?

"A. It meant to take the land.

"Q. To take how much land?

"A. 160 acres.

"Q. If it had been explained to the Indians that some of the allottees were getting not only 160 acres but getting as much as 100 acres or 125 acres additional by a technical rule of law under that description, how do you think that would have affected the willingness of the Indians to ratify the treaty?

* * * * * * *

"A. It never would have been adopted if we had understood it that way.

"Q. Never would have been adopted if you had understood it that way?

"A. No, sir.

"Q. How would it have affected your willingness, as a member of the Council, to agree to the ratification of the treaty, with that clause in there?

"A. I never would have agreed.

"Q. Was there anybody on the Council, or any Indian adviser to the Council who was learned in the common law of England?

"A. No, sir."

The testimony of Mr. Bruner is corroborated by many other members of the Creek Tribe, many of whom were in the Creek Houses of Legislature at the time these agreements were being considered (R. 30-49); also, by Judge Joseph A. Gill, who was United States Judge for the District of Indian Territory at the time the Creek Agreements were made (R. 26-30).

In commenting upon the testimony the lower Court took the view that the fact that the question of riparian rights was not discussed by the Indians at the time the Creek Agreements were ratified by the Creek Nation "is the strongest indication that there was no intention on the part of the grantor to reserve title" to these river beds. We submit that this conclusion is not justified in the light of the record before us.

The testimony clearly shows that the Indians had no knowledge of the common law doctrine of riparian ownership, and therefore could not discuss it. Nor was this doctrine ever explained to them by defendant's officers at the time of the Creek Agreements. Indian lands were held by the tribe for the benefit of all of its members—in communal ownership. Under this type of ownership the rivers were open to the use of all for watering their stock, for boating, trapping and fishing, etc. To the Indian mind there was no idea of absolute ownership in one member of the tribe to the exclusion of all. As is stated by the Principal Chief of the

Creek Nation, Pleasant Porter, when commenting upon the allotment plan ("And Still The Waters Run", by Angie Debo, Princeton University Press, 1940, pp. 146-147):

> "* * * It is something that never was tried before, this trying to educate a people up to a form of government and conditions alien to all their habits of thought and action.
>
> * * * * * * *
>
> "* * * Who can say but that we would finally have reached a stage of civilization toward which we were progressing slowly, but none the less surely, which would have suited our life better, than the civilization which has been so violently and suddenly thrust upon us—a civilization which in the matter of the care and disposition of property would have suited us far better than the cumbrous and intricate methods which you have of adjusting property interests among you."

Under these circumstances, could it then be said that from the mere fact that the Indian did not discuss one of the intricate doctrines of our common law wholly unknown to them, it may be inferred that the Indians intended to dispose of said river bed lands under the doctrine? We submit that the more reasonable view would be to treat the matter in the light of the understanding of the Indians at the time, and conclude that the common law doctrine of riparian ownership—unknown to the Creek Indians at the time of the Creek Agreements, was not explained to them by defendant's officers, and therefore was not discussed by them at the time—was not intended and understood to apply to the patents issued to riparian allottees; but that said patents conveying 160 acres of Creek National Domain to said allottees describing the meander lines as the boundaries, was not intended or understood by said Indians to convey by implication the river bed lands to the thread of the streams. This view would be consistent with the Indian

idea of land tenure, and, we submit, consistent with the understanding of the Creek Nation at the time—that said river bed lands were reserved from allotment as unallotted lands for the use and benefit of all until the Creek Nation ceased to exist as a nation.

Clearly the testimony shows that the Indians intended the river beds to remain the property of the tribe as unallotted lands until the nation ceased to exist as such. Certainly the riparian allottee after the receipt of his patent had the right to use the river bed lands, as the lower Court has pointed out, and have ingress and egress to it, and water his stock and otherwise use it, as he had theretofore done—but under the Indian understanding of the matter, he was not to do so to the exclusion of the other members of the tribe, and under the Indian custom he had this right to use the common property of the tribe along with the other members.

Admittedly, the policy of the United States was to individualize tribal lands by allotting them equally among the members of the tribe, and then disposing of the surplus or unallotted lands, for the benefit of the tribe. However, this policy would furnish no justification for giving Creek unallotted lands to others not entitled thereto, contrary to the understanding and intention of the parties to the Creek Agreements. By Section 28 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 148, the tribal existence of the Five Civilized Tribes was extended indefinitely, and the Creek Nation today exists as a nation. Even today certain of the unallotted lands of this nation have not been disposed of for the benefit of the tribe, and we submit that the title to these river bed lands was intended to remain in said Creek Nation until it ceased to exist as such.

Not only was this the understanding of the Indians, but also the understanding of the United States, the other party to the Creek Agreement. The letter of A. A. Jones, First

Assistant Secretary of the Interior, to the Attorney General, dated December 12, 1913, stated in part as follows:

> "The United States Attorney expresses the opinion that the Cimarron River is not in fact a navigable stream and that the Arkansas is not navigable where covered by the leases. He further expresses the view that if they are in fact non-navigable streams, then the State would have no interest and the Creek Nation's title could be more successfully asserted because of the effect of permitting the riparian owners to assert title to the thread of the stream would be to give to those allottees a greater acreage than other allottees in the Creek Tribe, which would be clearly in violation of the intention of Congress as expressed in the Act providing for allotment to the individual members of the Creek Tribe of the lands of said Tribe."

Therefore, from the viewpoint of the Creek Nation, and of their understanding at the time of the Creek Agreements, as well as the intention of the United States, the patents to riparian allottees issued under the terms of the Creek Agreements were not intended by implication to convey title to the thread of the streams within the Creek Nation, but the intention clearly was to convey land up to the meander lines only, the river bed lands being reserved to the tribe for the use and benefit of all until such time as the Creek Nation shall cease to exist as a nation.

The Creek River Bed Lands Had a Value at the Time of Allotment.

The lower Court further held that at the time of allotment the river beds were of no known value. Of course, to the Indian the value of these river bed lands could not be measured in dollars and cents. To them these lands were the means of a livelihood, some of their principal foods being fish and game, which were abundant along these streams in those days. Would the Indians have given this

means of a livelihood away to the riparian allottees to the exclusion of the other members of the tribe, if they had understood that the patents to said allottees did so by implication?

Did the river bed lands have a known value at the time of allotment? This allotment work covered a number of years, and the patents issued to the riparian allottees covered a period of time. The Mabel Dale allotment deeds were issued in 1904 (R. 8-12). During this process of allotment, oil was discovered in the Arkansas River basin near Red Fork, making these river bed lands a potential oil field. The testimony of T. C. Hughes, civil engineer, filed herein, is quoted in part as follows (R. 49):

> "Q. Was there any oil excitement in the vicinity of the Arkansas River in 1901 and 1902?
>
> "A. Yes, sir. There was some over at Red Fork. Some wells just beginning to be brought in.
>
> "Q. Is that continguous to the Arkansas River?
>
> "A. In the Arkansas River bottom—it lies beyond West Tulsa."

And in the publication "And Still The Waters Run", *supra*, p. 86, it is stated:

> " * * * Oil in paying quantities was discovered in the Red Fork Section of the Creek Nation in 1901, and great excitement resulted."

Aside from being valuable for oil and gas purposes these river bed lands also had a potential value for sewage, sand and gravel, water supply, etc., and these uses played an important part in the development of Creek towns that had been established long before allotment time (Rept. Dawes Comm., dated November 20, 1894, pp. 65-66). That the uses to which these river bed lands could have been put were not fully developed at allotment time, clearly would not lead to a conclusion that these lands were valueless.

We submit that the record shows that these river bed lands had a value at the time of allotment.

It has been held by this Court that an owner in fee of the bed of a river is the owner of valuable property (*Appleby* v. *City of Buffalo,* 221 U. S. 524); and also that where land is condemned the owner is entitled to full market value of land taken for any and all uses to which it might be put, in the light of present business conditions and those that might be reasonably expected in the immediate future (*Chicago M. & St. P. Ry. Co.* v. *Mason,* 122 N. W. 601).

The United States, as trustee of the Creek Nation, having full administrative control over the property and affairs of said nation, and the control of the drafting of the patents, allotment deeds, conveyances, and deeds of unallotted lands, by its failure to make provision in the patents to allottees to carry out the understanding of the parties to said Creek Agreements, left the matter ambiguous and open to construction, and permitted a technical rule of interpretation to divest the title of the Creek Nation to said river bed lands. Thus the United States gave tribal lands to others not entitled thereto, and we submit that the United States is now liable to the Creek Nation for the property so taken under the Fifth Amendment to the Constitution of the United States (*United States* v. *The Creek Nation,* 295 U. S. 103; *United States* v. *Shoshone Indians,* 299 U. S. 476; and *United States* v. *Klamath and Moadoc Tribes,* 304 U. S. 119).

Conclusion.

For the reasons set forth above, it is earnestly requested that the writ of certiorari be granted.

Respectfully submitted,

PAUL M. NIEBELL,
W. W. SPALDING,
Attorneys for Petitioner.

(3870)